EXHIBIT C

THE HONORABLE JUSTIN L. QUACKENBUSH

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[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

AT SPOKANE

PLUMBERS UNION LOCAL NO. 12 PENSION FUND, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. AMBASSADORS GROUP INC., et al., Defendants.	No. 2:09-cv-00214-JLQ CLASS ACTION SUBMISSION OF ROBBINS GELLER RUDMAN & DOWD LLP IN RESPONSE TO THE COURT'S FEBRUARY 28, 2012 INTERIM MEMORANDUM

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STATUTES, RULES AND REGULATIONS

Robbins Geller Rudman & Dowd LLP (hereafter "Lead Counsel" or the "Firm"), by and through its partners Darren J. Robbins and Michael J. Dowd, hereby submits this response pursuant to the February 28, 2012 Interim Memorandum by the Court (ECF No. 198) (hereafter "February 28 Order").[1]

I. INTRODUCTION

On November 30, 2011, this Court directed our partners, Joy Ann Bull and John K. Grant, as follows:

> [Y]ou better report this to Mr. Robbins and the other principals in your firm – and it might be worthwhile for you to order out a transcript of this hearing – so that other members of your firm in future cases will understand my concerns.

Transcript of November 30, 2011 Hearing on Proposed Class Action Settlement ("Nov. 30, 2011 Transcript") at 52.

In its February 28 Order, the Court further directed the Firm to respond in writing to the issues regarding Lead Counsel's "Disbursements" and "Expenses" and attorney fees and, more specifically, to: (1) the "Alleged Investigator Expenses"; (2) "Other Claimed Expenses," which included a $402 dinner and certain hotel, airfare, and mediation expenses; (3) the hours expended in connection with the prosecution of the case; and (4) the hourly rates included in the Firm's fee application.

These issues raised by the Court have been discussed at the highest levels of the Firm. The Firm's Executive Committee is acutely aware of this Court's statements at the November 30, 2011 hearing, this Court's November 10, 2011 Order re: Motion for Attorney Fees (ECF No. 185), November 23, 2011 Memorandum re: Fairness Hearing (ECF No. 190), November 28, 2011 Supplemental Memorandum re: Fairness Hearing

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[1] *See* Firm biographies of Darren Robbins and Michael Dowd, attached hereto as Exhibit 1.

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(ECF No. 191), December 7, 2011 Order re: Fairness Hearing (ECF No. 192) and February 28 Order.

Mr. Robbins and Mr. Dowd have each reviewed the relevant filings in this case, including every hearing transcript and each of the Court's orders in this case. We have spoken to Ms. Bull and Mr. Grant at length about this case and the Court's concerns. Moreover, because we agree there was cause for concern in this case, we convened a meeting with the attorneys in the Firm's Settlement Department, a general meeting of the Firm's partners, and a separate meeting with additional attorneys and staff to discuss the Court's concerns. Regretfully, mistakes happened in this case, and although they cannot be undone, the Firm has taken action to ensure as this Court noted, "that other members of your firm in future cases will understand [the Court's] concerns." Nov. 30, 2011 Transcript at 52.

We appreciate that the Court has permitted the Firm the opportunity to address these issues in writing, and are available to appear in person at any later date set by the Court for further hearing.

II. RESPONSE

After a thorough review of the record in this case, we agree there was cause for concern. We take these concerns seriously. Maintaining our Firm's hard-earned reputation with the clients we serve, the courts before whom we appear, the respected counsel that associate with our Firm and our opposing counsel is of the utmost importance to our law firm. At the motion to dismiss hearing, the Court stated:

> But if you listen to what I have to say, maybe you'll know what's in my mind. You know, I spent 20-some years at podiums like that, looking up at those blank faces, thinking: What's on that judge's mind? And so my experience in the 30 years now I've been on the federal bench is that it's helpful, whether I'm sitting on the Ninth Circuit or sitting here, to tell counsel what's on my mind.

May 20, 2010 Transcript of: Motions Hearing, ECF No. 81 at 12.

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The Court has made its concerns clear. We believe that we understand what is on the Court's mind and intend to address those concerns. In particular, the Court has raised concerns over our Firm's lodestar, expenses and the manner in which those items were presented to the Court. We have reviewed the lodestar, the expenses, the Firm's fee and expense application, and subsequent submissions in preparing this response. We have spent a significant amount of time reviewing these issues and have implemented corrective actions to address this Court's concerns. We regret that the Court was required to expend its valuable time and limited resources in connection with its consideration of the Firm's fee and expense application.

A. CLAIM FOR ATTORNEY FEES

In its February 28 Order, the Court noted that its concerns with the accuracy of the expenses "have also caused the court to view with some skepticism the attorney fee claims." February 28 Order, ECF No. 198 at 4. In considering our Firm's lodestar as a cross-check on the Firm's request for attorney fees, the Court raised issues with regard to both the submitted hours and rates requested.

1. Reported Hours

First, with regard to time spent, we spoke directly with each of the ten attorneys who billed time to this case in preparing this response. Each of the attorneys, other than Ms. Bull and Mr. Grant, confirmed that the time submitted to the Court on October 27, 2011 accurately reflected the hours they spent prosecuting this case. Ms. Bull identified one hour that had been incorrectly billed, as set forth in her declaration. Mr. Grant previously identified two mistaken entries and identified one other error in preparing for his discussion with Mr. Robbins and Mr. Dowd, as set forth in his declaration. We have also spoken to the paralegals and other staff personnel who billed 50 hours or more to this case. They have affirmed that their time, as submitted,

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was accurate. Therefore, based on our review, we believe that the time submitted, other than the four entries described above, is accurate.

We understand, however, the Court is concerned not just with the accuracy of the time reported but also with the efficiency, that is, whether the time spent was reasonably necessary to the prosecution of this case. It is difficult to reconstruct in hindsight the optimal amount of time that should be spent, since each case presents a unique mix of factual and legal circumstances and undoubtedly not all lawyers are equally efficient in our Firm, or any firm. In fact, for these reasons there has been considerable debate in the legal community about whether hours spent are a fair or an appropriate measure of actual value added. For example, a *Wall Street Journal* article observed that corporations have attempted to move away from paying defense firms by the billable hour. *See, e.g.*, Nathan Koppel & Ashby Jones, *'Billable Hour' Under Attack*, Wall St. J., Aug. 24, 2009 (attached hereto as Exhibit 2).

While we acknowledge that reasonable minds may disagree on the efficiency and necessity of particular tasks, we believe that our attorneys and staff have little incentive to spend more time than necessary on a matter. We do not bill our clients by the hour. In the majority of cases where we are successful in a securities case, we seek fees based on the percentage-of-the-fund method. Some of the jurisdictions in which we practice place little weight on our hours or rates in considering fee applications. *See, e.g.*, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 & n.27 (N.D. Ill. 2011) (stating "many courts in this circuit have criticized the use of a lodestar cross-check in common fund cases"). Moreover, even in jurisdictions where there is a lodestar cross-check, such as this one, there is no clear correlation between the lodestar and the fee awarded. For example, courts in this circuit have approved multipliers generally from 1 to 4 times lodestar. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (approving 3.65 multiplier and citing survey of

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class settlements from 1996 to 2001 showing most multipliers range from 1.0 to 4.0 with some much higher).

In short, in some jurisdictions additional time is not a factor in the fee awarded and in others it does not necessarily result in higher fees. The latter is particularly true in the Ninth Circuit. By contrast, if we are unsuccessful, hours spent in a particular case that were not reasonably necessary represent time that the Firm's lawyers could productively have spent on other cases.

Although we expect our attorneys to work efficiently, we also encourage our attorneys to not just work hard on their cases but to out-work opposing counsel. We hope that our attorneys zealously represent our clients and if that means that they spend long hours on a project or assignment, we do not criticize them for doing so. We believe that our interests are aligned with our clients since we are incentivized to maximize the recovery, not time spent.

We understand that a court reviewing a fee application may believe that our attorneys and staff took too much time on a particular task or on the case as a whole, and we certainly understand that courts can, and do, take this into consideration in determining an appropriate fee award. *See, e.g.*, *In re Infospace, Inc. Sec. Litig.*, 330 F. Supp. 2d 1203, 1214 (W.D. Wash. 2004) (Zilly, J.) (reducing lodestar by 5% "to discount for duplication and inefficiency"). Not only do courts adjust the lodestar, but, as noted above, courts vary considerably in the lodestar multiplier they consider reasonable and this may, in part, reflect a rough assessment of the efficiency of the hours expended. All we can expect is that our attorneys and staff record their time accurately.

2. Hourly Rates

Second, we understand that the Court also considered our hourly rates for both attorneys and staff to be too high, especially compared to rates in the Eastern District

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of Washington. Because we are a plaintiffs' firm and work on contingent-fee litigations, we believe the relevant market "rates" are the "percentage of fund" we seek, not hourly rates. In this regard, the Court has already recognized the Ninth Circuit's 25% benchmark in common fund securities fraud class actions, the percentage requested in this case. In addition, the 25% represents a cap on our fees which reduces the risk of awarding fees for time spent inefficiently. *See generally Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007) (noting that "[i]n a common fund case, where the defendant's liability is limited to the amount paid into the fund, there is no danger of unduly burdening that party with payment of the plaintiffs' attorneys' fee for time spent on unsuccessful claims").

Putting aside the percentage method, we represent clients in districts throughout the United States. We maintain a uniform national rate and we do not attempt to formulate rates that vary from state to state, or across particular federal districts within a state. We attempt, however, as best we can, to set our hourly rates at amounts charged by other firms who have a comparable national practice.

We are aware that in assessing a fee application in the context of a fee shifting statute, the Supreme Court has directed courts to apply a reasonable hourly rate measured "according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). And, that "'[g]enerally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits.'" *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir 2010) (citation omitted). As Judge Van Sickle has noted, however, in *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1992), the Ninth Circuit also recognizes a "limited exception to the general rule that the relevant community is where the district court sits." *Weatherhead v. United States*, 112 F. Supp. 2d 1058, 1076-77 (E.D. Wash. 2000). In many jurisdictions, class actions under the Private Securities Litigation Reform Act of

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1995 ("PSLRA") are a classic example of the type of action that falls within the ambit of the limited exception. *See generally Epstein v. Itron*, No. CS-97-214-RHW, slip op. at 4 (E.D. Wash. Nov. 19, 1999) (ECF No. 134) (concluding that "the general rule is, thus, probably not applicable" in a PSLRA case.) (Whaley, J.) (attached hereto as Exhibit 3). The prosecution of a PSLRA securities class action often involves a team of lawyers and other professionals, and requires a significant financial expenditure to prosecute. Although there are many talented lawyers in this district, our research identified no law firm in this district that had been appointed as PSLRA lead counsel in any of the 50 or so PSLRA class actions prosecuted in the district courts in Washington over the last decade or so. And we note that in this case, no other firm, based in Spokane or elsewhere, sought to be appointed lead counsel.

We recognize that our rates, like those of comparable national firms, may be higher than those charged by regional firms or other highly regarded lawyers in any particular jurisdiction and that they may be higher than the rates charged by lawyers who perform legal services other than securities litigation. There is also variation among district courts as to what are considered reasonable hourly rates, which may vary based on the type of work performed. *Compare Riverstone Center West, LLC v. Barnes & Noble Booksellers, Inc.*, No. CV-08-0395-EFS, slip op. at 4 (E.D. Wash. Dec. 15, 2010) (ECF No. 162) (approving $320 hourly rate for experienced attorney and $90 rate for paralegal in guaranty case), *with In re AmericanWest Bancorporation*, No. 10-06097-PCW11, Order and Application for Compensation (Bankr. E.D. Wash. June 2, 2011 and Apr. 26, 2011) (ECF Nos. 222 and 204) (order granting Application for Compensation providing payment for partners at up to a $945 hourly rate, associates at up to a $610 hourly rate, and paralegals at up to a $270 hourly rate in bankruptcy case) (attached hereto as Exhibits 4 and 5). We also recognize that even on an apples-to-apples basis, our hourly rates may not be the lowest. Thus, we

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understand that courts in certain jurisdictions, including this Court, may believe that our rates are higher than those charged by equally capable firms offering comparable services in that jurisdiction.

Here, we provided the Court with our rates and understand that the Court may opt to reduce those rates or take them into consideration in determining an appropriate lodestar multiplier for purposes of the lodestar cross-check.

B. Claim for Expenses

We have carefully reviewed our expense application, in particular Ms. Bull's declaration dated October 26, 2011 (ECF No. 181). We agree the Court had reason to be concerned in this case. We understand that there are times when our attorneys, despite diligent effort, make mistakes. Here, mistakes were made that should not have been.

"In-house" employees, including the investigator, Steve Peitler, should not have been included under a heading entitled "Disbursements." The declaration should have clearly distinguished between payments made to outside consultants, such as Financial Markets Analysis LLC, and time spent by an in-house investigator, such as Mr. Peitler. Although Ms. Bull's declaration identified Mr. Peitler under a sub-heading entitled "in-house," it should have been made perfectly clear to the Court that the Firm was asking the Court to award expenses at a market rate for in-house personnel, such as investigators, and not at the rate that they are paid internally. Regrettably, it did not.

We have spoken to Ms. Bull about this issue. Based on those discussions, we believe that she made a mistake and did not intend to mislead the Court. Nevertheless, her mistake has put the entire Firm's reputation and her career at risk. We have made clear to Ms. Bull the seriousness of this error and the possible shadow it casts on her colleagues and our Firm in doing our best to represent our clients in

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various jurisdictions and living up to the very high standards we set for ourselves. We are concerned by the negative impression this has created of our Firm with this Court, which had the confidence to appoint us as lead counsel, the impact on our associated counsel and our clients, and the negative press that our Firm has received as a result.

The manner in which these "in-house" categories were presented was unacceptable. Nevertheless, we note that had we made our intentions clear to the Court, the concept of seeking payment for in-house professionals at market rates is not one we believe to be either unfounded or inappropriate. There are divergent views among district courts as to how counsel should be compensated for the use of in-house professionals. Courts have opined that they should be included in lodestar, like partners, associates and other professionals, which could result in a multiplier over their market rate, while other courts have viewed such time as properly included as an expense. *Compare In re Enron Corp. Sec.*, 586 F. Supp. 2d 732, 823 (S.D. Tex. 2008) (finding inclusion of in-house investigators as part of lodestar subject to multiplier was appropriate and noting that objectors "contend that Lead Counsel inflates the lodestar by improperly including $6,168,358 which should be categorized as 'expenses' generated by [in-house] forensic accountants, economic analysts, investigators, and document clerks"), *and In re Qwest Communc'ns Int'l, Inc.*, 625 F. Supp. 2d 1143, 1148-49 (D. Colo. 2009) (approving 3.3 multiplier over lodestar that included hours by in-house accountants at "law firms' current rates"), *with In re Initial Pub. Offering Secs. Litig.*, 671 F. Supp. 2d 467, 507 (S.D.N.Y. 2009) (noting submission listed investigators in both lodestar ***and*** expenses and stating "I also excluded the lodestar of experts and investigators because their fees were already included [in] the expense request"). Nevertheless, we understand that it is one thing to request that in-house professionals, including investigators, be considered at market rates rather than calculating their implied cost per hour, but it is quite another to not

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provide the Court with the tools to enable it to carefully assess the expense application and what its constituent parts mean. The former is a matter left to the discretion of the Court, the latter is unacceptable because it does not allow the Court to make an informed decision about our request.

The second expense in Ms. Bull's October 26, 2011 declaration that should have been, at a minimum, reduced was the dinner for four on the night before the mediation. Although both Ms. Bull and Mr. Grant have confirmed that they reviewed meal expenses before submitting them in an effort to identify any item that was not reasonable and necessary, this item was not flagged, reduced or eliminated. It should have been.

As to certain other expenses questioned by the Court, including the two airfares and hotel expenses, those represent actual charges by the airline and hotel which were paid by the Firm. We do not mark up those costs. And, although Mr. Grant lodged in Spokane at a rate of $170 per night on another occasion, the Court's concern about Mr. Grant's room charge of $189 per night plus applicable taxes and late checkout fee is well taken. We do not, however, believe the hotel charges incurred in connection with the mediation were excessive. The hotel was selected for its location. The hotel is within a short walking distance of the offices of Irell & Manella, the site of the mediation. We acknowledge that the base rates of $265 and $299 per night (and total charges of $359, $371 and $398, including taxes, meals and/or parking) paid in connection with the mediation were modestly higher than available daily rates (before fees and taxes) of: (i) $200 per night at the Holiday Inn Express Newport Beach; and (ii) $239 per night at the Newport Beach Marriott that we identified in connection with our preparation of this response. We allow our attorneys to stay at hotels that, in our experience, are similar in cost to those that comparable firms use in travel. For example, it is not uncommon for our lawyers to find themselves staying at the same

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hotels as defense counsel when traveling for depositions or mediation. Certainly, we recognize that the Court may exercise its discretion and reduce the requested reimbursement of expenses for hotel costs incurred in connection with the prosecution of this matter.

Third, we reviewed the airfares charged to this case, including the flight taken from New York to Los Angeles on the night before the mediation by Mr. Robbins. As an initial matter, we believe that it was beneficial for Mr. Robbins to attend the mediation as he has substantial experience in favorably resolving PSLRA class actions. The flights taken in this case ranged in cost from $176 to $2,169. We understand that the Court has concerns as to whether a flight which cost $1,676 and another which cost $2,169 were reasonable and necessary and whether the class should absorb these costs. We endeavor to incur airfare expenses only as necessary and use a travel service to arrange travel and accommodations. Generally, we book fully refundable fares which are higher priced than nonrefundable fares because in our experience our travel plans often change and rebooking fees can be substantial. Since we are reimbursed for expenses only if we both prevail in the case and a court awards expenses, which can be many years after the case is initiated, we strive to incur only those expenses that are reasonable and necessary. For example, the $1,676 for the investigator's airfare was incurred prior to the Court's ruling on the motion to dismiss when there was considerable risk it would never be reimbursed. We incurred it nonetheless because our attorneys believed the trip was necessary for us to win the case. In fact, our willingness and ability to take great risk and expend the resources necessary to pursue litigation whose outcome is uncertain is a factor clients favor in selecting counsel in PSLRA cases. *See, e.g.*, *Enron*, 586 F. Supp. 2d at 827 (noting that one of the factors in appointing lead plaintiff was lead plaintiff's selection of counsel which employed a team of lawyers, investigators, and forensic accountants).

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The flight that Mr. Robbins purchased to attend the mediation was purchased on short notice and we recognize that less expensive flights were likely available. We acknowledge that even though these amounts were actual out-of-pocket amounts, the Court would be justified in reducing the amounts awarded with respect to these flights.

Unlike hourly rates, we have less visibility into the expense reimbursements sought by comparable national firms. *See In re Synthroid Mkg Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) (noting expenses should be based on what private market would permit). Thus, we understand that when we incur expenses, there is always a risk that the court may disallow expenses because the court finds them to be excessive. *See, e.g., Initial Pub. Offering*, 671 F. Sup. 2d at 505.

Finally, the Court noted that "surely the mediator's fee could not have been some $30,000." February 28 Order, ECF No. 198 at 4. While we understand the amount is very significant, it was the actual fee. Although it does little to moderate the magnitude of the fee, the mediator's fee did include preparation time before the mediation and follow-up work thereafter, which work ultimately yielded a favorable outcome for the class. Layn Phillips charged $24,350 for the mediation, approximately one half for preparation time and one half for the day of the mediation. In this case, Mr. Phillips charged an additional $5,700 for post-mediation follow-up efforts. Plaintiff's portion of the aggregate fee was $15,025.

While the Court questioned the accuracy of the mediator's fee and not necessarily whether it was reasonable and necessary, this expense was, in our view, reasonable and necessary. First, the vast majority of securities class actions that settle do so with the assistance of a mediator. Although our clients are almost always amenable to settlement discussions without the assistance of a mediator, they rarely result in a settlement. Second, there are very few mediators who specialize in PSLRA

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securities class action cases and, in our experience, actually help the parties achieve a resolution. Layn Phillips is one of those mediators. As the Court noted at the November 30, 2011 hearing, Layn Phillips was a federal judge for several years and has served successfully as a mediator in many complex securities cases, including PSLRA class actions involving UnitedHealth, Qwest, USWest and Washington Mutual. Layn Phillips is viewed as completely neutral and as having the ability to grasp and help resolve a complex case without requiring multiple mediation sessions conducted over extended periods of time. He is frequently proposed as a mediator by defendants, as he was in this case. Because he is fair, experienced and no-nonsense, we often agree to use his services. In light of the paucity of mediators familiar with the intricacies of PSLRA class actions, who are viewed as fair and neutral by both plaintiffs and defendants, it is a mediators' market in terms of their cost. And plaintiffs, like defendants, pay it. While substantial in amount, Layn Philips's fees in this case are comparable to his fees and other mediator fees that have been approved by courts in many other cases. We believed it reasonable to pay more for a mediator who we believed was reasonably likely to get the job done, than pay somewhat less for a mediator who lacks the same proven effectiveness to get the parties to find common ground.

III. REMEDIAL MEASURES

We take this Court's concerns very seriously and have taken steps in response beyond those set forth above.

First and foremost, we circulated this Court's November 10, 2011 and December 7, 2011 orders, and its November 23, 2011, November 28, 2011 and February 28, 2012 memoranda, as well as the transcript of the November 30, 2011 hearing, to all of our partners and instructed them to read them.

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In addition, we held a meeting with the four partners that work in our Settlement Department. We discussed the Court's concerns in this case with them directly and in particular the expense issues raised by the Court. We have instructed our settlement partners that if we seek reimbursement for the time expended by non-lawyer professionals at market rates in an expense application, we make that request perfectly clear and include appropriate details so that each district court can make an informed decision. A federal district judge is entitled to be provided with the appropriate information to make his or her decision. All we can do going forward is ensure that what we incurred, as opposed to what we request, is crystal clear. We shall do so.

We have internal guidelines on travel expenses. When our attorneys fail to adhere to those guidelines or when a partner believes that an expense is otherwise excessive, we expect them to reduce it or eliminate it entirely in submitting an expense application to a court. Our team should have done that with the dinner addressed at page 3 of the February 28 Order. We held a partner meeting on March 15, 2012 to discuss this Court's concerns and the reasonableness of hotel, meal, and airfare expenses. We reinforced our expectations to ensure that they are met in the future and to remind our attorneys that we are either spending our clients' money or the Firm's money, and either way, it should only be spent as reasonable, appropriate and necessary.

As to hours worked, we continue to expect our attorneys and staff to work hard on behalf of our clients. We do not want them to avoid performing necessary tasks because they are concerned that they will be criticized for billing too many hours to a project. We want them to do what it takes to do the job right. However, we have reminded our attorneys about proper documentation of time spent and that as the time spent increases so should the description of services performed to enable a court to

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assess the reasonableness of the time spent in those jurisdictions where a lodestar cross-check is utilized. On March 16, 2012, we held a mandatory meeting for attorneys, paralegals, and other timekeepers to re-affirm our expectations regarding the level of detail that we believe is necessary to provide a court performing a lodestar cross-check with the information needed to conduct its analysis.

IV. CONCLUSION

We appreciate the opportunity to respond in writing and in person. We have taken steps to address the errors and to reduce the possibility that they recur.

We apologize that unintentional yet serious errors resulted in the Court spending an undue amount of time considering our fee and expense request and understand that those errors justifiably caused the Court to question additional items. We have spent considerable time reviewing these matters in the hope that our response and remedial efforts demonstrate to the Court the seriousness with which we take this matter and our desire to address the Court's concerns. Despite these errors, we do believe that we achieved a good result for the class and that our work provided value to the class.

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We hope that we have addressed this Court's concerns. We are ready to appear in person to answer any questions the Court wishes to be answered.

DATED: March 19, 2012

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
DARREN J. ROBBINS
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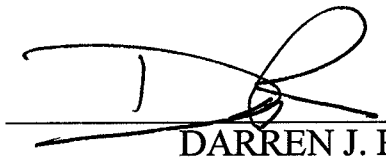

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EXHIBIT 1

DARREN J. ROBBINS

Darren J. Robbins is a founding partner of Robbins Geller and a member of its Executive and Management Committees. Mr. Robbins oversees various aspects of the Firm's practice, including the Firm's Institutional Outreach Department and its Mergers and Acquisitions practice. Mr. Robbins has served as lead counsel in more than one hundred securities-related actions, which have yielded recoveries of over $2 billion for injured shareholders.

One of the hallmarks of Mr. Robbins' practice has been his focus on corporate governance reform. For example, in *UnitedHealth*, a securities fraud class action arising out of an options backdating scandal, Mr. Robbins represented lead plaintiff the California Public Employees' Retirement System and was able to obtain the cancellation of more than 3.6 million stock options held by the company's former CEO and a record $925 million cash recovery for shareholders.

Education: B.S., University of Southern California, 1990; M.A., University of Southern California, 1990; J.D., Vanderbilt Law School, 1993

Honors/Awards: One of the Top 100 Lawyers Shaping the Future, *Daily Journal*; One of the "Young Litigators 45 and Under," *The American Lawyer*; Attorney of the Year, *California Lawyer*; Managing Editor, *Vanderbilt Journal of Transnational Law*, Vanderbilt Law School

MICHAEL J. DOWD

Michael J. Dowd is a founding partner in the Firm's San Diego office and a member of the Firm's Executive and Management Committees. Mr. Dowd is responsible for prosecuting complex securities cases and has obtained significant recoveries for investors in cases such as *AOL Time Warner*, *UnitedHealth*, *WorldCom*, *Qwest*, *Vesta*, *U.S. West* and *Safeskin*. In 2009, Mr. Dowd served as lead trial counsel in *Jaffe v. Household Int'l Inc.* in the Northern District of Illinois, which resulted in a jury liability verdict for plaintiffs expected to yield in excess of $1 billion for the injured class. Mr. Dowd also served as the lead trial lawyer in *In re AT&T Corp. Sec. Litig.*, which was tried in the District of New Jersey and settled after only two weeks of trial for $100 million. Mr. Dowd served as an Assistant United States Attorney in the Southern District of California from 1987-1991, and again from 1994-1998.

Education: B.A., Fordham University, 1981; J.D., University of Michigan School of Law, 1984

Honors/Awards: Attorney of the Year, *California Lawyer*; Director's Award for Superior Performance, United States Attorney's Office; Top 100 Lawyers, *Daily Journal*, 2009; B.A., *Magna Cum Laude*, Fordham University, 1981

EXHIBIT 2

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THE WALL STREET JOURNAL.
WSJ.com

LAW | August 24, 2009

'Billable Hour' Under Attack

In Recession, Companies Push Law Firms for Flat-Fee Contracts

By NATHAN KOPPEL and ASHBY JONES

With the recession crimping legal budgets, some big companies are fighting back against law firms' longstanding practice of billing them by the hour.

The companies are ditching the hourly structure -- which critics complain offers law firms an incentive to rack up bigger bills -- in favor of flat-fee contracts. One survey found an increase of more than 50% this year in corporate spending on alternatives to the traditional hourly-fee model.

Pfizer earlier this year reached a deal with law firms, doing away with billable hours and switching to a flat fee. The pharmaceutical company's general counsel, Amy Schulman, talks about what was behind the arrangement.

The shift could further squeeze earnings at top law firms. The past 18 months have been brutal for some big law firms as work that hinges on vibrant credit markets, such as deal making, has flat-lined.

Pfizer Inc., which spends more than $500 million a year on legal matters, says it expects to reduce its domestic law-firm spending by 15% to 20%, largely through flat-fee arrangements. It will pay 16 law firms lump sums to handle various portfolios of work, such as litigation and tax matters. "I have told firms you cannot make your historical profit margins" on Pfizer work, said the pharmaceutical giant's general counsel, Amy Schulman.

Cisco Systems Inc. has notified its stable of outside law firms that it is vital for the company to move away from the hourly billing structure. Cisco now uses fixed fees or other alternatives to the billable hour for about 80% of its legal work, said its general counsel, Mark Chandler.

American Express Co. also has stepped up its use of alternative billing arrangements, and "I haven't had one firm in 2009 tell us, no, that they flatly wouldn't entertain something that moves away from the traditional straight hourly model," said the company's chief litigation counsel, Stuart Alderoty. "The paradigm has changed."

Money spent on alternative billing arrangements has totaled $13.1 billion this year, versus $8.6 billion in the like period of 2008, according to BTI Consulting Group Inc., which surveyed 370 lawyers who work at Fortune 1000 companies. The Wellesley, Mass., firm said that the lawyers reported average

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Pascal Perich for The Wall Street Journal

Amy Schulman, general counsel of Pfizer Inc.

cost savings of 15% from using alternative arrangements. It said 63% of the surveyed lawyers planned to increase their use of alternative billing arrangements.

Companies have long complained that legal fees are inflated by a business model in which law firms have high-priced junior lawyers who must be kept busy billing for work that could be handled more efficiently. With the recession, companies have the leverage to force changes, say some lawyers at both client companies and law firms. "Law firms are more receptive to change because they are in the business of needing legal work," said Daniel Fitz, chairman of the Association of Corporate Counsel.

Partner profits were down an average of 4% last year at the highest-grossing firms, according to American Lawyer magazine. Their hourly rates have risen to a range of $300 to $1,000. But with the slump, firms have had to dismiss associates, reduce salaries and cut back on hiring of new graduates. "Just like the tech and housing bubbles, there was a legal-profession bubble, and now we are experiencing a correction," says David Antzis, managing partner of Philadelphia-based Saul Ewing LLP, which is doing more fixed-fee work.

Associated Press

Pfizer is pushing for fixed-fee arrangements with law firms.

Pfizer could have demanded a discount from firms' hourly rates, Ms. Schulman said, but she hopes for a shift to a system that encourages firms to work more collaboratively with Pfizer and with other law firms that service Pfizer. The flat-fee program "should be something fundamentally different that will last beyond whatever people think they have to tolerate because of the economy," she said.

Some legal departments have for years experimented with flat fees for certain types of repetitive, predictable work like patent applications. Attorneys say it is doubtful flat fees could ever supplant hourly billing for the most complicated and high-stakes matters, such as an antitrust fight with the government or a particularly tricky corporate merger, where it's too hard to estimate how much effort it will consume.

Associated Press

American Express also has stepped up its use of alternative billing arrangements.

In addition, "a client can't expect to have the absolute best team of [trial] lawyers from a firm, and have the lawyers give up all the other work they could be doing on a regular-fee basis, to work 18 hours a day for months of time on a flat-fee engagement," said Barry Ostrager, a Simpson Thacher & Bartlett LLP partner who handles civil trials.

Orrick, Herrington & Sutcliffe LLP, a San Francisco-based firm, has tripled the revenue it generates from alternative billing arrangements in the past year, but maintained profitability through efficiencies, said David Fries, chief client-service officer. Software sends an email to lawyers when they hit certain levels of a fixed-fee budget, as a reminder to work efficiently. Financial analysts file biweekly reports analyzing how lawyers'

Page 3 of 3

time is being spent. "You find that someone may have spent 200 hours on something" that isn't crucial, Mr. Fries said.

Orrick has also altered the mix of lawyers it employs, focusing less exclusively on hiring graduates from elite law schools, who can command starting pay of $160,000. It is employing some college graduates who can perform routine tasks at a lower cost.

Saul Ewing in Philadelphia recently investigated a client's potential corporate acquisition under a six-week flat-fee engagement. The matter was handled about 10% more cheaply for the client than it would have been under a billable-hour deal, said Mr. Antzis, the managing partner. He said "it was still fair to the firm" because "we were incentivized to get done in 10 hours what another lawyer at another firm may have spent 12 hours doing."

At Sidley Austin LLP, Sara Gourley, a partner, said changes made by Pfizer have given her more freedom to put the best mix of lawyers on a legal matter. Pfizer used to have a rule that no lawyer with an hourly rate higher than a second-year attorney's could bill the drug company for legal research. Now that costs are fixed, Ms. Gourley says, she has been able to assign a senior associate to perform Pfizer legal research who could get the answers much more quickly than a junior lawyer might.

Write to Nathan Koppel at nathan.koppel@wsj.com and Ashby Jones at ashby.jones@wsj.com

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARK EPSTEIN et al.,

Plaintiffs,

v.

ITRON et al.,

Defendants.

NO. CS-97-214-RHW

ORDER APPROVING SETTLEMENT AND PLAN OF ALLOCATION AND AWARDING ATTORNEY FEES, *INTER ALIA*

Before the Court are Plaintiffs' Motion for Approval of Settlement and Plan of Allocation, and Motion for Attorney Fees. These matters were argued on September 16, 1999. John R. Layman, Steven J. Toll, and Joseph J. Tabacco argued for Plaintiffs; Barry M. Kaplan for Defendants. The motions were taken under advisement pending the submission of supplemental materials regarding expenses. This will memorialize the Court's rulings.

A. Approval of settlement

The file reflects five opt-outs, several of whom offer their opinions about securities litigation in general and this case in particular, but does not disclose any formal objection, and the comment/opt-out period is now closed.

Itron had $20 million in insurance coverage, and somewhat less than $3 million in liquid assets. **Ct. Rec. 113, page 18.** If the defense spent dollar-for-dollar what Plaintiffs did, the coverage would have been depleted by slightly over $3 million at the time of the settlement, leaving somewhat less than $17 million available. At the hearing, defense counsel confirmed that this figure is approximately accurate. Given the costs

associated with completing the 20 depositions contemplated, engaging in serious motion practice, and ultimately trial, accepting $12 million early on is eminently reasonable.

Had the case gone forward, the harder Plaintiffs made Defendants work, the less recovery they would have received. The class would have been doubled up on expenses, paying not only class counsels' expenses (assuming success), but effectively "paying" Defendants' expenses as well because insurance coverage was a wasting asset. Add to that the risk of losing, at trial or on appeal, the years of delay inherent in the system, and the possibility that the carriers might disclaim coverage at the conclusion of trial, it is clearly in the best interests of the class to take a sure 12¢ on the dollar now.

B. Plan of allocation

Plaintiff's expert John Torkelsen hypothethizes that the price moves following the disclosures made on September 11, 1996 and October 22, 1996 each reflect a decrease in inflation and nothing more. **Ct. Rec. 115, ¶¶ 13-15.** That is the way it is usually done. But for reasons he does not fully explain, he takes the price move following the May 30, 1996 disclosure and slices it in half. ***Id.*, ¶ 12.** One-half he considers a decrease in inflation (Defendants' technology didn't work), and the other half, he attributes to potential buyers withholding orders for reasons unrelated to technology. ***Id.*** Torkelsen did this "to be fair and equitable." ***Id.***

If one stopped with his declaration, it would appear that there ought to be more in the record than a market analyst's ruminations about what's fair and equitable to support this approach. It favors those who purchased after May 30, 1996 at the expense of those who purchased earlier. In their memo, however, Plaintiffs explain that this allocation was done because some claimants "have a relatively stronger claim for greater damages that could have been recovered at trial." **Ct. Rec. 114, page 16.** The concept is expanded upon in counsels' joint declaration by noting that there were comparatively few actionable misrepresentations made during the first nine months of the class period. **Ct. Rec. 113, ¶ 54.** Giving credit to those who are in the best position to know the relative

strengths and weaknesses of Plaintiffs' case, this is enough to warrant endorsing the plan.

C. Attorney fees

Legal work in the case was characterized at every turn as thoroughly professional and technically accomplished. Counsel contend that 30% would be a fair return for their effort and risk. While the work performed is faultless, enhanced fees are not warranted for several reasons. A plethora of trial court decisions to the contrary, it is now firmly settled at the circuit level that the benchmark in common fund cases is 25%. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *accord, Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *In re Washington Public Power Supply Sys. Litig.*, 19 F.3d 1291, 1297 (9th Cir. 1994); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). Courts have discretion to depart up or down depending on the facts of a given case, but a deviation must be supported by articulable justifying reasons. The Court can say with certainty that the work performed was of a quality that would be expected from firms of this stature, but sees nothing so out of the ordinary as to warrant diminishing class recovery beyond the norm. We cannot lose sight of the fact that the "court, class counsel, and class representatives all have [a] continuing duty to protect absent class members." *Jerry Enterprises, Inc. v. Allied Beverage Group*, 178 F.R.D. 437, 443 (D. N.J. 1998).

1. Methodology

The emerging majority rule is that considerations of fairness, self-policing of fees, and judicial economy render the percentage method by far the more attractive in common fund cases, as opposed to traditional lodestar methodology. *See State of Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (historical overview). However, trial courts retain discretion to employ either the percentage or the lodestar method when circumstances favor one over the other. *Washington Public Power, supra*, 19 F.3d at 1295-96.

In the aggregate, counsel spent 11,000 hours of attorney time and, at ordinary

billing rates, this totals $2,362,000. **Ct. Rec. 117, Exhibit A, ¶ 7.** That means the average hourly rate for everyone, from full partner to junior associate, is $215. Ordinarily, this would run afoul of the rule that the presumptive lodestar rate is the rate prevailing in the relevant community, which in this case is Spokane, because that is where the case would have been tried. *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991); *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. 1990). Only when unusual circumstances warrant the importation of high-priced counsel will non-local rates be applied. *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140-41 (8th Cir. 1982).

From a technical standpoint, there was nothing unusual about the case other than the threshold issue of whether the Complaint met newly-enacted pleading requirements. *See Epstein v. Itron, Inc.*, 993 F. Supp. 1314 (E.D. Wash. 1998), *disavowed, In re Silicon Graphics Inc. Securities Litig.*, 183 F.3d 970, 974-75 (9th Cir. 1999). There was nothing about the case so arcane, esoteric, or specialized that a Spokane attorney could not have handled it. From a practical standpoint, however, it is questionable how many local firms would have been willing to front expenses of this magnitude, plus support 11,000 hours of billable time, plus commit to take the matter through trial. In this high stakes arena, perhaps it is inherent in the system that only a handful of superstar firms will dominate the field. While the general rule is, thus, probably not applicable, one cannot lose sight of the fact that the class is paying west coast prices for eastern Washington work.

2. Percentage

As indicated, the Ninth Circuit has adopted a benchmark of 25%, with upward or downward adjustments for unusual features that take a case out of the norm. *Paul, Johnson*, 886 F.2d at 272. There has been a movement afoot by some trial courts to raise the benchmark to 30%. *In re Activision Securities Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989). Counsel cite 198 cases that have awarded 30% or more. **Ct. Rec.**

116, Attachment. The Court has not read them all by any means, but enough to know that one of the factors relied upon in exceeding the 25% benchmark is the level of work required. The court in *Activision* analyzes 14 decisions awarding (or approaching) 30%, and finds a common thread. "Most of these cases achieve this result after lengthy motion practice, volumes of discovery, and hence, the accumulation of extensive attorney time on behalf of all parties." 723 F. Supp. at 1377. Moreover, counsel misread *Activision*. The author of the opinion, after stating repeatedly that 30% is the benchmark, awarded only 22% in attorney fees. *Id.* at 1379. The balance of the 32.8% award was for expenses. *Id.*

It might be argued that the efficiency with which the case was resolved should count for something. Document discovery and prefiling inquiry were heavy, but beyond that, there was a motion to appoint lead plaintiffs, a motion to dismiss, a motion for class certification, and a handful of depositions. That was it. Efficiency should count for something, but it should not count for being paid more because less work was required.

Counsel characterize the recovery as "exceptional," "superior," "excellent," and "outstanding." **Ct. Recs. 116, page 1; 114, pages 1, 16; 113, pages 3, 22.** Torkelsen believes total recovery at trial could have been $66.74 million. **Ct. Rec. 115, ¶ 3.** Gross recovery was $12.075 million, and approximate net (assuming counsel receive what they ask for in fees and costs) will be about $7.9 million. Less than 12¢ net on the dollar does not sound all that exceptional. For reasons stated in the section addressing approval of the settlement, it was the best that could be expected. Defendants could not place on the table what they did not have, and it is improbable that a $66.74 million judgment would have been collectible. But getting the best that can be expected under the circumstances is not the same as saying it was an extraordinary recovery warranting extraordinary fees.

D. Expenses

When an officer of the Court represents he incurred expenses, and could document them with business records, that should settle the matter. However, there was nothing in

the record from which the reasonableness of the expenses could be ascertained. It would be fair to start with the premise that counsel would not have spent money unnecessarily. They were not working on a cost-plus basis, but on a contingency, with no guarantee of recovery. The managing partners of the seven firms involved would have had something to say about lavish spending. It is also notable that expenses total only 4% of gross recovery although, unlike attorney fees, expenses expressed as a percentage of recovery have no real meaning because each case runs up its own sort of costs. While the total costs appeared reasonable, the bare summaries raised question marks with respect to certain line items. Travel expenses for one firm in the amount of $123,830.58 represents a lot of travel. **Ct. Rec. 117, Exhibit A, ¶¶ 5 & 8.** In order to discharge its obligation to the absent class members, the Court requested supplementation of the record beyond the bare summaries.

The record has now been supplemented, and the expenses request reduced to $470,386.32. The questions raised have been answered. The Court is satisfied that the expenses claimed were reasonable and necessary to the effective prosecution of the case.[1]

E. Compensation to lead Plaintiffs

Class counsel recommends the payment of $3,500 to each of the lead Plaintiffs. Their level of participation could be better documented, but for a 2-year-old case, the sum requested appears reasonable. It is not unusual to reward lead plaintiffs with "incentive" or "recognition" payments when their efforts benefit the class as a whole. *In*

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[1]In the initial submissions, the Court discovered several computational errors, but counsel have caught these in their supplemental materials, except for one. The Milberg Weiss summary is totaled wrong and overstates the line items by $646.35. However, attached to the declaration is a 13 page computerized report. The Court will accept the report over the summary and simply assume that several items did not find their way into the summary.

re Telectronics Pacing Sys., 186 F.R.D. 459, 482 (S.D. Ohio 1999).

F. Opt-outs

Five opt-outs have been received; three of which are timely: Janell Bloodworth Itee, Lloyd D. Ashford, and Rosemary Redd. Two additional untimely submissions were received: Children's Health Care Wilke, and Mellon Trust. Class counsel recommends honoring all five. The Court will do so. The above-identified individuals shall be excluded from the class, and shall neither participate in the settlement proceeds, nor be bound by the judgment herein.

G. Sealing

The settlement placed on the record before Magistrate Judge Suko was ordered sealed, as was the parties' Supplemental Agreement Regarding Requests for Exclusion. The only purpose was to avoid public knowledge of the parties' agreement that Defendants could withdraw from the settlement if a certain percentage of the class chose to opt out. Now that the opt-out period has closed, there is no longer any need to maintain these materials under seal. Absent objection made within 10 days, they will be unsealed.

H. Relief from LR 7.1(g)

The local rule prohibits citation to unpublished opinions. When an unpublished opinion has something to say that is not otherwise available, the local rule may be waived, as it has been before in this case. But here, *Paul, Johnson* is controlling. A stack of unpublished trial court opinions a mile high can't change *Paul, Johnson*.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion for Approval of Settlement and Plan of Allocation (**Ct. Rec. __**) is **GRANTED**. The parties' Proposed Final Judgment and Order of Dismissal is being entered concurrently herewith.

2. Plaintiffs' Motion for Attorney Fees and Expenses (**Ct. Rec. __**) is **GRANTED**. Fees in the amount of $3,000,000 are approved, as are expenses in the

amount of $470,386.32.

3. Plaintiffs' Motion for Relief from Local Rule 7.1(g) **(Ct. Rec. 119)** is **DENIED.**

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and to furnish copies to counsel.

DATED this 19 day of November 1999.

ROBERT H. WHALEY
United States District Judge

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EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RIVERSTONE CENTER WEST, LLC, a Washington company, RIVERSTONE CENTER EAST, LLC, a Washington Company, and RIVERSTONE CENTER, LLC, a Washington company,

Plaintiffs,

v.

BARNES & NOBLE BOOKSELLERS, INC., a Delaware corporation, and BARNES & NOBLE, INC., a Delaware corporation,

Defendants.

NO. CV-08-0395-EFS

ORDER GRANTING AND DENYING IN PART DEFENDANTS' MOTION FOR ASSESSMENT OF THE REQUESTED ATTORNEYS' FEES AND COSTS PURSUANT TO IDAHO LAW

Before the Court, without oral argument, is Defendants Barnes & Noble Booksellers, Inc. ("Booksellers") and Barnes & Noble, Inc.'s (Barnes & Noble) (collectively, "Barnes & Noble Defendants") Motion for Assessment of the Requested Attorneys' Fees and Costs Pursuant to Idaho Law (ECF No. 142), which requests $642,927.34 in attorneys' fees and $613,845.24 in costs. Plaintiffs Riverstone Center West, Riverstone Center East, and Riverstone Center (collectively, "Riverstone Companies") agree that Barnes & Noble Defendants, as the substantially prevailing party, are entitled to an award of reasonable attorneys' fees and taxable court costs, but contend that 1) the requested hourly rates for counsel are unreasonable and that many of the requested paralegal hours are for unrecoverable clerical and training tasks, and 2) the requested costs

include nontaxable costs. After reviewing the submitted material and relevant authority, the Court is fully informed. For the reasons given below, the Court grants ($624,499.50 in attorneys' fees) and denies (portion of the requested attorneys' fees; bill of costs to be refiled) in part the motion.

A. Authority and Analysis

The determination of attorneys' fees is a matter of substantive law; therefore, a federal court sitting in diversity applies the forum state's law when assessing attorneys' fees. *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009); *Kona Enters, Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000). However, when determining taxable costs in a diversity action, a federal court generally applies federal law because reimbursement of costs is an issue of trial procedure.[1] *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1167-68 (9th Cir. 1995). With Idaho law as its guide in relation to the attorneys' fees request and federal law as its guide in relation to the cost request, the Court turns to each request.

1. Attorneys' Fees

Idaho Code 12-120(3) states:

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[1] State law applies to procedural matters only if 1) "the pedigree of the federal rule could not be traced back to a federal statute or a Federal Rule of Civil Procedure" or 2) "the federal rule created an incentive to shop for the federal forum." *Id.* at 1167-68. For the reasons set forth in *Aceves*, federal law, and in particular Local Rule 54.1, will control the reimbursement of taxable cost, including expert witnesses, in this diversity action. *Id.* at 1168.

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, *guaranty*, or *contract* relating to the purchase or sale of goods, wares, merchandise, or services and *in any commercial transaction* unless otherwise provided by law, *the prevailing party shall be allowed a reasonable attorney's fees to be set by the court, to be taxed and collected as costs*.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. . . .

(Emphasis added.) Section 12-120(3) not only applies to a prevailing plaintiff, but also to a defendant who successfully defends a claim embraced by this statute. *Pinnacle Performance, Inc. v. Hessing*, 135 Idaho 364, 370 (Ct. App. 2001); *Freiberger v. Am. Triticale, Inc.*, 120 Idaho 239, 243 (1991).

Although Barnes & Noble was the only signatory to the Lease,[2] the Court finds both Defendants may recover attorneys fees under Idaho Code 12-120(3) because the gravamen of this action, including the guaranty,

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[2] Booksellers, as a signatory to the Lease, is entitled to an award of reasonable attorneys' fees not only pursuant to Idaho Code 12-120(3) but also under Lease paragraph 37.9, which states:

> In the event either party hereto initiates litigation or hires legal counsel to enforce or protect its rights under this Lease, the substantially prevailing party shall be entitled to recover from the unsuccessful party, in addition to other damages or relief awarded or obtained, all court costs and reasonable attorneys' fees incurred in connection with such litigation or action by legal counsel, as determined and awarded by such judicial authority.

Barnes & Noble was the guarantor and its guaranty is unilateral so there is contractual provision allowing it to recover attorneys' fees against the Riverstone Companies.

was a commercial transaction. *See Gunter v. Murphy's Lounge*, 141 Idaho 16, 32 (2005). Further, the Court finds that all of the Riverstone Companies' claims, including the tortious interference claim, arose from the commercial transaction. Finding that Barnes & Noble Defendants are entitled to reasonable attorneys' fees, the Court turns to assess the reasonableness of the requested fees.

The Riverstone Companies oppose the reasonableness of the hourly rates charged by defense counsel. The Court finds the hourly rates charged by Elizabeth Tellessen, Christopher Crago, and Collette Leland, as well as the $80.00 law clerk hourly rate and the paralegal hourly rates, reasonable. The Court, however, reduces the claimed hourly rates for Matthew Anderson, Beverly Anderson, and Lynden Rasmussen. The Court finds $320.00 is a reasonable hourly rate for Mr. Anderson given that he is a member of the American College of Trial Lawyers, he has been a federal civil litigator for a number of years, and this matter involved complex contract issues. The Court finds $300.00 to be a reasonable hourly rate for Ms. Anderson and Mr. Rasmussen.

The Riverstone Companies do not object to the requested legal hours, and the Court finds the requested legal hours reasonable. Idaho R. Civ. P. 54(e)(3). Accordingly, the Court awards the following fees for counsel's work:

Counsel	Hourly Rate	Total Hours	Award
C. Matthew Anderson	$320.00	997	$319,040.00
Beverly Anderson	$300.00	105.6	$31,680.00
Lynden O. Rasmussen	$300.00	1.7	$510.00
Ryan D. Yahne	$250.00	217.90	$54,475.00

Elizabeth Tellessen	$200.00	420.0	$84,000.00
Christopher Crago	$175.00	9.0	$1,575.00
Collette Leland	$170.00	499.9	$84,983.00
			$576,263.00

Further, the Court reduces Defendants' requested paralegal costs because a number of the tasks were clerical or training. *See P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 239 (2007). The following requests are denied:

Date	Initials	Hours	Unawarded Amounts
1/26/09	CLK	1.0	$90.00
11/6/09	CLK	0.8	$72.00
11/12/09	CLK	0.5	$45.00
11/30/09	RJH	0.7	$52.50
12/2/09	RJH	0.5	$37.50
12/2/09	RJH	0.7	$52.50
12/9/09	RJH	0.5	$37.50
12/9/09	CLK	2.1	$189.00
12/10/09	RJH	1.0	$75.00
12/10/09	CLK	0.8	$72.00
12/11/09	CLK	1.1	$99.00
1/5/10	RJH	1.9	$142.50
1/5/10	RJH	4.0	$300.00
1/11/10	CLK	1.5	$135.00
1/12/10	RJH	4.0	$300.00
1/13/10	RJH	6.0	$450.00
1/15/10	RJH	5.8	$435.00
1/19/10	RJH	0.8	$60.00
1/20/10	RJH	0.7	$52.50

1/20/10	JK	0.5	$45.00
1/21/10	RJH	0.4	$30.00
2/2/10	RJH	5.5	$412.50
2/5/10	RJH	3.8	$285.00
2/8/10	RJH	5.0	$375.00
2/9/10	RJH	3.0	$225.00
2/10/10	RJH	1.0	$75.00
2/12/10	RJH	0.7	$52.50
2/17/10	RJH	1.0	$75.00
2/19/10	RJH	1.9	$142.50
2/19/10	RJH	3.0	$225.00
2/19/10	RJH	1.0	$75.00
2/19/10	RJH	1.0	$75.00
2/25/10	RJH	4.0	$300.00
3/1/10	RJH	2.0	$150.00
3/2/10	RJH	0.1	$7.50
3/3/10	RJH	0.1	$7.50
3/3/10	RJH	0.3	$22.50
3/3/10	RJH	0.2	$15.00
3/15/10	RJH	0.1	$7.50
3/16/10	RJH	0.1	$7.50
3/16/10	RJH	0.1	$7.50
3/18/10	RJH	0.2	$15.00
3/18/10	RJH	0.2	$15.00
3/18/10	RJH	0.1	$7.50
3/19/10	RJH	0.1	$7.50
3/23/10	RJH	0.2	$15.00
3/30/10	RJH	1.3	$97.50
3/30/10	RJH	1.5	$112.50
3/30/10	RJH	1.5	$112.50

3/30/10	CLK	1.1	$99.00
3/31/10	RJH	1.0	$75.00
3/31/10	RJH	0.4	$30.00
3/31/10	RJH	0.3	$22.50
3/31/10	RJH	1.0	$75.00
4/8/10	RJH	0.4	$30.00
4/8/10	CLK	1.0	$90.00
4/9/10	RJH	1.2	$90.00
4/14/10	RJH	1.2	$150.00
4/15/10	RJH	0.8	$60.00
4/15/10	RJH	0.8	$60.00
4/28/10	JK	0.2	$18.00
5/3/10	RJH	0.5	$37.50
5/6/10	RJH	1.0	$75.00
5/24/10	RJH	0.5	$37.50
5/26/10	RJH	1.0	$75.00
6/2/10	RJH	0.8	$60.00
6/2/10	RJH	0.5	$37.50
6/3/10	RJH	1.3	$97.50
6/3/10	RJH	3.5	$262.50
6/4/10	RJH	9.0	$675.00
6/8/10	RJH	3.5	$262.50
6/9/10	RJH	6.5	$487.50
6/24/10	RJH	1.0	$75.00
6/25/10	RJH	4.0	$300.00
6/29/10	RJH	3.0	$225.00
6/30/10	RJH	3.5	$262.50
7/12/10	CLK	0.5	$45.00
		TOTAL:	**$9,511.50**

After reducing these clerical hours from the requested paralegal hours (ECF No. 147, p. 30), the following paralegal award is made:

Paralegal	Hourly Rate	Awarded Hours	Award
CLK	$90.00	359.6	$32,364.00
EC	$90.00	.50	$45.00
RJH	$75.00	196.1	$14,707.50
		TOTAL:	**$47,116.50**

In summary, the Court awards $624,499.50 in attorneys' fees: $576,263.00 for counsel; $47,116.50 for paralegals; and $1,120.00 for law clerks (fourteen hours at $80.00 per hour).

2. Costs

As mentioned above, Local Rule 54.1 governs the recovery of costs. Therefore, within fourteen days after the Order's entry, the Barnes & Noble Defendants shall file a modified cost request consistent with Local Rule 54.1. *See* http://www.waed.uscourts.gov/publications/ao133.pdf. The Clerk of Court will then review the bill of costs.

Given Riverstone Defendants' reliance on *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Court takes this opportunity to comment upon it. 482 U.S. 437 (1987). In *Crawford Fitting Co.*, the Supreme Court ruled that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* at 445. Here, there is no explicit statutory or contractual authorization for taxable costs exceeding §§ 1821 and 1920s limitations. Congress has not lifted §§ 1821 or 1920's limitations. And although Lease paragraph 37.9 allows the prevailing party to recover "all court costs," this language only explicitly allows for the recovery of "*court*

costs." By modifying "cost" with "court," the parties did not agree that the prevailing party would recover expert witness fees in excess of the standard witness fees. 28 U.S.C. § 1920(3) (citing to 28 U.S.C. § 1821(b), (d)(1), (c)(4)).

B. Conclusion

For the above-given reasons, **IT IS HEREBY ORDERED:**

1. Barnes & Noble Defendants' Motion for Assessment of the Requested Attorneys' Fees and Costs Pursuant to Idaho Law **(ECF No. 142)** is **GRANTED and DENIED IN PART.**

2. Judgment is to be entered in Barnes & Noble Defendants' favor against the Riverstone Companies jointly and severally in the amount of $624,499.50 for attorneys' fees.

3. Within fourteen days of this Order's entry, Barnes & Noble Defendants shall refile its bill of cost as directed above.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide a copy to counsel and Lee Ann Mauk.

DATED this 15th day of December 2010.

s/Edward F. Shea
EDWARD F. SHEA
United States District Judge

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EXHIBIT 5

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

LF 2016D (5/05)

Case Name: AmericanWest Bancorporation Case Number: 10-06097-PCW-11

ORDER AWARDING COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES PURSUANT TO 11 U.S.C. §330 or §331

THIS MATTER HAVING come before the Court on the # 1st (☑ interim ☐ final) application of G. Larry Engel and Morrison & Foerster LLP dated 4/26/11 docket # 204 for an order allowing compensation for services rendered and reimbursement of expenses in the above entitled case; and the court being fully advised in the premises:

NOW THEREFORE the below listed amounts are hereby allowed and awarded as compensation and reimbursement pursuant to 11 USC §330 or §331 to the above-named applicant and are authorized to be disbursed or transferred from funds of the above entitled estate, subject to the availability of funds and the provision of any confirmed plan. *

Compensation in the amount	$ 523,777.25
Reimbursement in the amount of	$ 12,948.99
TOTAL	$ 536,726.24

* If for first application, includes compensation earned pre-petition and filing fees and other costs incurred pre-petition.

Summary of all prior award on previous applications:

Compensation	$
Reimbursement	$
Total	$ 0.00

Disbursement information for this award:

Received directly from debtor by appl	$ 430,939.99
To be paid by transfer from attorney trust account:	$
To be paid by	$ 105,786.25
Total	$ 536,726.24

Presented by: G. Larry Engel
Name
Address: 425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

Patricia C. Williams
Bankruptcy Judge

06/02/2011 11:10:22

ORDER ALLOWING COMPENSATION AND REIMBURSEMENT OF EXPENSES

Local Form 2016 (2/06)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

Case Name: AMERICANWEST BANCORPORATION Case Number: 10-06097-PCW-11

APPLICATION FOR AWARD OF COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES PURSUANT TO 11 USC 330

Name of Applicant: G. Larry Engel and MORRISON & FOERSTER LLP
Position of Applicant: (i) special counsel for AmericanWest Bancorporation ("AWBC") and (ii) special counsel for the directors and officers of AWBC

Application Number: 1 ☒ Interim ☐ Final

The undersigned applicant applies to the court for an award or allowance of compensation for services rendered and for reimbursement of expenses incurred in the above entitled case pursuant to 11 USC 330 (*or USC 331 if an interim application*). This application is supported by the following information and attached documents.

I. (*If applicant is employee of trustee, debtor in possession or creditors committee*) Date of Entry of Order Approving Employment: Employment approved *nunc pro tunc* as of the Petition Date of October 28, 2010.

II. Dates Covered by this Application: October 28, 2010 to March 31, 2011.

III. The name, position, hourly rate, total time spent and amount requested for all compensation for services rendered by each person covered by this application, in connection with this case, is as follows (*If this is the FIRST Application, include **ALL** time and amounts, both pre- and post -petition in this Application*):

Name	Position	Hourly Rate	Total Time	Amount Requested
Engel, G. Larry	Partner	$795.00	95.00	$75,525.00
Feldman, Stephen	Partner	$945.00	0.50	$472.50
Fields, Henry	Partner	$815.00	45.30	$36,919.50
Fields, Henry	Partner	$865.00	1.05	$908.25
Kohler, Kenneth	Partner	$705.00	104.00	$73,320.00
Kohler, Kenneth	Partner	$725.00	21.10	$15,297.50
Maeder, Gary	Partner	$740.00	1.00	$740.00
Gillett, Mark	Partner	$705.00	0.80	$564.00
Thorpe, Andy	Partner	$595.00	0.80	$476.00
Barrage, Alexandra	Of Counsel	$635.00	165.10	$104,838.50
Barrage, Alexandra	Of Counsel	$670.00	0.50	$335.00
Novak, Vincent	Associate	$535.00	133.70	$71,529.50
Novak, Vincent	Associate	$610.00	3.30	$2,013.00
Hiensch, Kristin	Associate	$525.00	50.00	$26,250.00
Keen, Jonathan	Associate	$380.00	155.80	$59,204.00
Keen, Jonathan	Associate	$450.00	29.50	$13,275.00
Kushner, Dina	Associate	$325.00	94.70	$30,777.50
Kline, John	Paralegal	$250.00	43.20	$10,800.00
Kline, John	Paralegal	$270.00	1.60	$432.00
Susoyev, Steve	Paralegal	$200.00	0.50	$100.00
Totals:			**947.45**	**$523,777.25**

IV. Total amount of REIMBURSEMENT of expenses requested by this application in connection with this case (*If this is the **FIRST** Application, include **ALL** costs (including filing fees), both pre- and post -petition*): $12,948.99

V. Total of Compensation and Reimbursement requested: $536,726.24

VI. (If applicant is a trustee) The maximum amount of compensation allowable under 11 USC 326(a) is: $ N/A.

VII. (*If applicant is an employee of trustee, debtor in possession or creditors committee*). All Compensation for services rendered and reimbursement of expenses incurred for which award is sought were necessary to the administration of the case; beneficial to the estate, and does not include any unnecessary duplication of services.
☐Yes ☐No ☒N/A (If answer is NO attach an explanation.)

VIII. (*If applicant is the attorney for the debtor*) All compensation for services rendered and reimbursement for expenses incurred for which award is sought for representing the interests of the debtor(s) were necessary and beneficial to the debtor(s) in connection with the case.
☒Yes ☐No ☐N/A (*If answer is NO attach an explanation*).

IX. Compensation or reimbursement previously received has been shared with another entity, or an agreement or understanding exists between the applicant and any other entity for sharing of compensation received or to be received for services rendered in or in connection with this case, except as a member or regular associate of a firm of lawyers. ☐Yes ☒No (*If answer is YES attach an explanation*).

X. Attached to this application, and made part of this application are the following supporting documents:

a. ☒ Statement of Money or Property Received or Promised Other than by Applicant (*required in all cases, LF 2016A*);
b. ☒ Summary Supporting Application for Compensation for Services or Reimbursement of Expenses (*required in all cases, LF 2016B*);
c. ☒ Itemization of Services Rendered (*required; itemization must be by project category if cumulative compensation exceeds $10,000*);
d. ☒ Itemization of Expenses (*required*); and
e. ☒ Narrative Summary (*required if cumulative compensation exceeds $10,000, LF 2016C*).

The undersigned Applicant states under penalty of perjury that the representations contained in this application and attachments are true and correct to the best of applicant's knowledge and belief.

DATED: 4/26/11

(*Signature of Applicant*)

Name: G. Larry Engel and MORRISON & FOERSTER LLP
Position: (i) special counsel for AmericanWest Bancorporation ("AWBC") and (ii) special counsel for the directors and officers of AWBC
Address: Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105-2482
Phone: (415) 268.7000; Fax: (415) 268.7522

Local Form 2016A (9/99)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

Case Name: _____ Case Number: _____

STATEMENT OF MONEY OR PROPERTY RECEIVED OR PROMISED IN CONNECTION WITH THIS CASE OTHER THAN BY APPLICATION OR A PLAN

Name of Applicant: _____
Position of Applicant: _____
Application Number: _____

☑ No Money or property was received or promised other than by application as a part of a Chapter 13 Plan.

(a) Money or things of value received other than by application or as part of a Chapter 13 Plan:

(1)	Amount received by attorney or firm for filing fee	$ 0.00	
(2)	Amount received before the order for relief by attorney or firm for services and costs	$ 1,010,000.00	
(3)	Amount received after the order for relief by attorney or firm for services and costs	$ 430,939.99	
(4)	Value of any property or service given to attorney or firm as payment of fees and costs Description:	$ 0.00	
(5)	Total of entries 1, 2, 3 and 4		$ 1,440,939.99
(6)	Amount remaining in client trust account	$ 0.00	

(b) Amount applied to filing fee and services *(Subtract entry (a)(6) from entry (a)(5))* $ (1,440,939.99)

(c) Money promised: $ 0.00
Nature of arrangement for promise of payment:
_____

(d) Total amount and value of all money or property received or promised other than by Application or a Chapter 13 Plan *(items (a)(5) and (c))* $ 1,440,939.99

(e) Other Items *(Value and description of any liens, guarantees, security interests or promissory notes):*
N/A

(f) Source of Payment of Promise *(If other than the debtor, identify entity and relationship to the debtor):*
N/A

STATEMENT OF MONEY OR PROPERTY RECEIVED

Local Form 2016B (3/02)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

Case Name: _____ Case Number: _____

SUMMARY SUPPORTING APPLICATION FOR COMPENSATION FOR SERVICES OR REIMBURSEMENT OF EXPENSES

Name of Applicant: _____
Position of Applicant: _____
Application Number: _____

Sequential #		Applied for	Awarded	Received
A Receipts other than by Application *(Transfer from (b) of Application LF 2016A)*	**Date** **Compensation** **Expenses**			4/25/11 $ 417,991.00 $ 12,948.99
Prior Application # N/A	**Date** **Compensation** **Expenses**	_____ $ _____ $ _____	_____ $ _____ $ _____	_____ $ _____ $ _____
Prior Application # N/A	**Date** **Compensation** **Expenses**	_____ $ _____ $ _____	_____ $ _____ $ _____	_____ $ _____ $ _____
Prior Application # N/A	**Date** **Compensation** **Expenses**	_____ $ _____ $ _____	_____ $ _____ $ _____	_____ $ _____ $ _____
Present Application *(Transfer totals from III & IV of Application)* #_____	**Date** **Compensation** **Expenses**	_____ $ 523,777.25 $ 12,948.99		
Totals B	**Compensation Expenses** **Total Comp. + Exp.**	$ 523,777.25 $ 12,948.99 $ 536,726.24	$ 0.00 $ 0.00 $ 0.00	$ 417,991.00 $ 12,948.99 $ 430,939.99

SUMMARY SUPPORTING APPLICATION FOR
COMPENSATION AND REIMBURSEMENT OF EXPENSES